91-1789

No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

FRANK A. PECORA, Senator,
44th Pennsylvania Senatorial District,
Petitioner,
v.
PENNSYLVANIA LEGISLATIVE
REAPPORTIONMENT
COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Respondent Pennsylvania Legislative Reapportionment Commission deprive the Petitioner, State Senator Frank A. Pecora, of the equal protection of the laws in violation of the Fourteenth Amendment by arbitrarily singling out his 44th Senatorial District in western Pennsylvania for elimination in mid-term, where his district was "squeezed out" and his term was truncated in mid-term solely for partisan political reasons and not in order to meet the "one-person, one-vote" mandate of the Equal Protection Clause?

2. Did the Respondent Pennsylvania Legislative Reapportionment Commission, by singling out State Senator Frank A. Pecora's 44th Senatorial District for elimination in mid-term, engage in an unconstitutional, political gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment?

3. Did the action of the Respondent Pennsylvania Legislative Reapportionment Commission in eliminating the old 44th Senatorial District in western Pennsylvania and creating a new 44th Senatorial District in southeastern Pennsylvania unconstitutionally abridge the First Amendment right of the citizens in the new 44th Senatorial District to petition the Pennsylvania Legislature for redress of grievances, in view of the facts that Petitioner Senator Frank A. Pecora can no longer serve as Senator from the 44th District due to State constitutional residency requirements and that no election to fill the new 44th Senatorial District seat will be held until November 1994?

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OPINIONS BELOW

The short per curiam opinion of the Pennsylvania Supreme Court accompanying its February 14, 1992 Order upholding the constitutionality of the Final Plan of the 1991 Pennsylvania Legislative Reapportionment Commission (Pet. App. [hereinafter "A"] 1-3) has yet to be officially or unofficially reported. It should be noted that this opinion states that "[o]pinions will follow" (A 3). As of the date of this Petition, no additional opinions have been issued by the Pennsylvania Supreme Court.

JURISDICTION

The judgment of the Pennsylvania Supreme Court (A 1-3) was entered on February 14, 1992. The jurisdiction of the Court is invoked under 28 *U.S.C.* § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the First Amendment to the United States Constitution, the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, Article II, §§ 2, 3, 5, 6, 7, 16, and 17 of the Pennsylvania Constitution, and § 2209 of Title 25 of the Pennsylvania Statutes. These provisions are as follows:

> CONSTITUTION OF THE UNITED STATES
>
> AMENDMENT I.
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> AMENDMENT XIV.
>
> Section 1. Citizens of the United States.
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA

ARTICLE II.

§ 2. Election of members; vacancies

Members of the General Assembly shall be chosen at the general election every second year. Their term of service shall begin on the first day of December next after their election. Whenever a vacancy shall occur in either House, the presiding officer thereof shall issue a writ of election to fill such vacancy for the remainder of the term.

§ 3. Terms of members

Senators shall be elected for the term of four years and Representatives for the term of two years.

* * *

§ 5. Qualifications of members

Senators shall be at least twenty-five years of age and Representatives twenty-one years of age. They shall have been citizens and inhabitants of the State four years, and inhabitants of their respective districts one year next before their election (unless absent on the public business

of the United States or of this State, and shall reside in their respective districts during their terms of service).

§ 6. Disqualification to hold other office

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under this Commonwealth to which a salary, fee or perquisite is attached. No member of Congress or other person holding any office (except of attorney-at-law or in the national guard or in a reserve component of the armed forces of the United States) under the United States or this Commonwealth to which a salary, fee or perquisite is attached shall be a member of either House during his continuance in office.

§ 7. Ineligibility by criminal convictions

No person hereafter convicted of embezzlement of public moneys, bribery, perjury or other infamous crime, shall be eligible to the General Assembly, or capable of holding any office of trust or profit in this Commonwealth.

* * *

§ 16. Legislative districts

The Commonwealth shall be divided into fifty senatorial and two hundred three representative districts, which shall be composed of compact and contiguous

territory as nearly equal in population as practicable. Each senatorial district shall elect one Senator, and each representative district one Representative. Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.

§ 17. Legislative Reapportionment Commission

(a) In each year following the year of the Federal decennial census, a Legislative Repportionment Commission shall be constituted for the purpose of reapportioning the Commonwealth. The commission shall act by a majority of its entire membership.

(b) The commission shall consist of five members: four of whom shall be the majority and minority leaders of both the Senate and the House of Representatives, or deputies appointed by each of them, and a chairman selected as hereinafter provided. No later than 60 days following the official reporting of the Federal decennial census as required by Federal law, the four members shall be certified by the President pro tempore to the Senate and the Speaker of the House of Representatives to the elections officer of the Commonwealth who under law shall have supervision over elections.

The four members within 45 days after their certification shall select the fifth member, who shall serve as chairman of the commission, and shall immediately certify his name to such elections officer. The chairman shall be a citizen of the Commonwealth other than a local, State or Federal official holding an office to which compensation is attached.

If the four members fail to select the fifth member within the time prescribed, a majority of the entire membership of the Supreme Court within 30 days thereafter shall appoint the chairman as aforesaid and certify his appointment to such elections officer.

Any vacancy in the commission shall be filled within 15 days in the same manner in which such position was originally filled.

(c) No later than ninety days after either the commission has been duly certified or the population data for the Commonwealth as determined by the Federal decennial census are available, whichever is later in time, the commission shall file a preliminary reapportionment plan with such elections officer.

The commission shall have thirty days after filing the preliminary plan to make corrections in the plan.

Any person aggrieved by the preliminary plan shall have the same thirty-day period to file exceptions with the commission in which case the commission shall have thirty days after the date the exceptions were filed to prepare and file with such elections officer a revised reapportionment plan. If no exceptions are filed within thirty days, or if filed and acted upon, the commission's plan shall be final and have the force of law.

(d) Any aggrieved person may file an appeal from the final plan directly to the Supreme Court within thirty days after the filing thereof. If the appellant establishes that the final plan is contrary to law, the Supreme Court shall issue an order remanding the plan to the commission and directing the commission to reapportion the Commonwealth in a manner not inconsistent with such order.

(e) When the Supreme Court has finally decided an appeal or when the last day for filing an appeal has passed with no appeal taken, the reapportionment plan shall have the force of law and the districts therein provided shall be used thereafter in elections to the General Assembly until the next reapportionment as required under this section seventeen.

(f) The General Assembly shall appropriate sufficient funds for the compensation and expenses of members and staff appointed by the commission, and other

necessary expenses. The members of the commission shall be entitled to such compensation for their services as the General Assembly from time to time shall determine, but no part thereof shall be paid until a preliminary plan is filed. If a preliminary plan is filed but the commission fails to file a revised or final plan within the time prescribed, the commission members shall forfeit all right to compensation not paid.

(g) If a preliminary, revised or final reapportionment plan is not filed by the commission within the time prescribed by this section, unless the time be extended by the Supreme Court for cause shown, the Supreme Court shall immediately proceed on its own motion to reapportion the Commonwealth.

(h) Any reapportionment plan filed by the commission, or ordered or prepared by the Supreme Court upon the failure of the commission to act, shall be published by the elections officer once in at least one newspaper of general circulation in each senatorial and representative district. The publication shall contain a map of the Commonwealth showing the complete reapportionment of the General Assembly by districts, and a map showing the reapportionment districts in the area normally served by the newspaper in which the publication is made. The publication shall also state the population of the senatorial and representative districts

having the smallest and largest population and the percentage variation of such districts from the average population for senatorial and representative districts.

ELECTION OF STATE SENATORS AND REPRESENTATIVES

At the general election in the year one thousand nine hundred and twenty-two, and quadriennially thereafter, Senators shall be chosen to serve for four years in the even-numbered districts. At the general election in the year one thousand nine hundred and twenty-four, and quadriennially thereafter, Senators shall be chosen to serve for four years in the odd-numbered districts.

The Senators now in office shall continue in such office, and shall respectively represent the districts as herein apportioned in which they reside until the expiration of the terms for which they were elected.

STATEMENT OF THE CASE

The Petitioner Frank A. Pecora was originally elected to the Senate of the Pennsylvania Legislature by the voters of the 44th Senatorial District in 1978 (A 6). He was re-elected in 1982, 1986, and 1990 (*Id.*).

The Respondent Pennsylvania Legislative Reapportionment Commission (hereinafter "the Commission") was formed in 1991 for the purpose of engaging in a legislative reapportionment of the Pennsylvania Legislature in the wake of the federal 1990 decennial census. *See Pa. Const.* Art. II, § 17(a). In accordance with the requirements of the Pennsylvania Constitution, *see Pa. Const.* Art. II, §17(b), the following State legislators were appointed as members of the Commission: State Senator Joseph Loeper (Republican), the State Senate Majority Leader; State Senator Robert J. Mellow (Democrat), the State Senate Minority Leader; State Representative H. William DeWeese (Democrat), the State House Majority Leader; and State Representative John M. Perzel (Republican), the State House Minority Chairman (A 97).[1] These four members were unable to agree on the fifth member, who would serve as Chairman of the Commission. Pursuant to *Pa. Const.* Art. II, § 17(b), the Pennsylvania Supreme Court appointed Robert J. Cindrich as the fifth member and Chairman of the Commission (A 100).

The Pennsylvania Constitution divides the Commonwealth into 50 senatorial districts. *Pa. Const.* Art. II, § 16.

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1 The record reflects that State Representative Allen Kukovich (Democrat) acted in behalf of Representative DeWeese in his capacity as Deputy Commissioner for Representative DeWeese (A 97).

From his original election in 1978 until the entry of the Pennsylvania Supreme Court's Order on February 14, 1992, upholding the validity of the Commission's Final Plan of Reapportionment, *see Pa. Const.* Art. II, § 17(e), the 44th Senatorial District was located in Allegheny County in western Pennsylvania. Altogether, seven senatorial districts were located in Allegheny County: four even-numbered districts (Districts 38, 40, 42, and 44), and three odd-numbered districts (Districts 37, 43, and 45) (A 24-26, 103).

Pennsylvania State Senators are elected to staggered, four-year terms of office. *See Pa. Const.* Art. II, §§ 2 and 3; Act of May 16, 1921, P.L. 449, codified at 25 *P.S.* § 2209. Beginning in 1924 and every four years thereafter, Senators have been elected from the odd-numbered districts. Thus, State Senators representing odd-numbered districts were last elected in November 1988 and consequently face reelection in November 1992. Likewise, beginning in 1921 and every four years thereafter, Senators were elected from the even-numbered districts. Senators presently representing even-numbered districts were elected in November 1990 and will not face reelection until November 1994.

Under the Commission's plans of reapportionment drawn up in the wake of the federal decennial censuses of 1970 and 1980, no State Senator's term was truncated in mid-term. In 1970, the boundaries of only the odd-numbered senatorial districts were changed, and in 1980 only the even-numbered districts' boundaries were altered, thereby insuring that no State Senator's four-year term of office would be cut off in mid-term (A 8).

The 1990 decennial census data showed that Allegheny County had suffered a decline in population of over 125,000 people since 1980 (A 24-25, 104). When analyzed by district, the following population losses were recorded:

Odd-numbered Districts

Dist.	Party Affil.	1990 Pop.	Loss
37	(Sen. Fisher-Rep.)	229,901	8,570
43	(Sen. Dawida-Dem.)	212,035	26,687
45	(Sen. Blean-Dem.)	210,735	26,796

Even-numbered Districts

Dist.	Party Affil.	1990 Pop.	Loss
38	(Sen. Bodack-Dem.)	208,321	30,506
40	(Sen. Hart-Rep.)	234,439	2,297
42	(Sen. Scanlon-Dem.)	218,170	7,943
44	(Sen. Pecora-Rep.)	223,153	13,776

(A 25-26.)

As can be seen from these figures, the four Democratic districts in Allegheny County (Districts 38, 42, 43, and 45), all located within the City of Pittsburgh and southeastern Allegheny County (Mon Valley) (A 104), lost a total of 101,932 people (A 24). On the other hand, the three Republican districts (Districts 37, 40, and 44), located outside the City of Pittsburgh (A 104), lost just 24,643 people (A 25), "almost one-fourth the number of loss as within the city" (A 104).

Despite the statistics demonstrating the major loss of population in the City of Pittsburgh/Mon Valley and the relatively minor loss of population in the three districts outside the City, including the 44th District, and despite the Commission's past practice of avoiding the truncation of the terms of State Senators in mid-term, the 1991 Final Plan of Reapportionment (A 41-94) calls for the elimination of Senator Pecora's 44th Senatorial District and the creation of a new 44th District in an area of southeastern Pennsylvania (A 81-82, 92, 94).[2]

The Pennsylvania Constitution contains two residency requirements for State Senators, a "one year next before" residency requirement,[3] and a "term of service" residency

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2 The new 44th District covers parts of Berks, Chester, Lehigh, and Montgomery Counties (A 81-82, 94).

3 The Pennsylvania Constitution provides that Senators "*shall have been* citizens and inhabitants of the State for four years, and *inhabitants of their respective districts one year next before their election[.]" Pa. Const.* Art. II, § 5 (emphasis added). The term

requirement.[4] The 44th Senatorial District having been moved to southeastern Pennsylvania, Senator Pecora no longer meets either one of these State constitutional residency requirements, thereby making it impossible for him to continue to serve as the Senator for the new 44th Senatorial District. The 1991 Final Plan of Reapportionment therefore effectively truncated Senator Pecora's four-year term of office in mid-term. No other Senator's term was truncated in mid-term by the 1991 Final Plan, which allowed all of the other incumbent Senators to serve out their full four-year terms.

A review of the record of the hearing held by the Commission on the 1991 Preliminary Plan of Reapportionment on September 25, 1991 provides compelling support for the conclusion of fact that the Commission, in eliminating the old 44th Senatorial District in Allegheny County and in creating the new 44th Senatorial District in eastern Pennsylvania, was motivated solely by partisan political concerns. The sole member of the Commission who voted against the adoption of the Preliminary Plan of Reappor-

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"inhabitant" as used in § 5 of Article II means "the most permanent type of dweller or resident." *In re Lesker*, 377 Pa. 411, 105 A.2d 376, 378 (1954). Thus, a candidate for State Senator must "be an inhabitant (a permanent resident) within his claimed legislative district; and he must have resided there, that is, maintained a permanent home establishment there, for at least a year." 105 A.2d at 378.

4 Pennsylvania State Senators "shall reside in their respective districts *during their terms of service.*" *Pa. Const.* Art. II, § 5 (emphasis added) (see also A134-135).

tionment, essentially because it eliminated the 44th Senatorial District in Allegheny County, namely Senator Loeper (A 122-123), expressed the opinion that the Commission, in adopting a reapportionment plan, should be guided solely by population shifts and not by partisan concerns. Thus, Senator Loeper stated as follows:

> I don't believe that our mission is to make sure that there is a partisan balance as far as the House and Senate is concerned. I believe that our mission is not to have to merge a Republican and Democratic district, and I think that what we have to base our decisions on are the demographics of the area.

(A 103.)

In response to Senator Loeper's comments, Chairman Cindrich initially stated, "I think it's nothing short of preposterous to suggest that politics play no part in a reapportionment" (A 110). Cindrich then elaborated on this comment as follows:

> To suggest . . . that it is possible, given the constitutional mandate as to the creation of the Commission, to construct any form of reapportionment plan for the State without taking into account political issues such as the balance of political power, protection of incumbencies, is, as I have already said, preposterous, and I don't think I need to comment any further on it.

(A 111.)

The Chairman then admitted that the question of the political balance of power had dominated the Commission's deliberations concerning reapportionment:

> [W]hat we have tried to do, what I have tried to do as a neutral, is listen to the arguments of both parties as to how their political opportunities will be enhanced or damaged by one configuration or another. As a matter of fact, *I would say that about 99 percent of the discussion we have had over the past 90 days has been along those lines.*

(A 113 (emphasis added).)

With respect to the 44th Senatorial District question, Cindrich made the following very revealing comments:

> Now, with regard to Allegheny County, there is no question that the demographics, and that is the shift in population has mandated that a Senate seat be lost. There simply are not enough people in that side of the State to support as many Senators as were supported before, when you consider that we need about 238,500 per Senate seat. *So one of them had to be squeezed out.*
>
> The political parties take positions. Naturally, if you are a Democrat, a good position is to say that you should combine two Republican districts so that there will only be one Republican left. And if you're a Republican, as the Republicans did propose, you should combine two

> Democrat districts as that there will be one less Democrat around. And if you're a neutral Chairman you say, *why don't you combine one of each so that neither of you gains an advantage* by virtue of the fact that the Constitution requires us to match up the population with the district, and that's what the Chairman did.

(A 114-115 (emphasis added).) In other words, Cindrich "called it as I see it, and yes, *there is an element of politics in that decision*, and I say it because as I've indicated prior, to suggest otherwise would be just to deny reality and deny the very composition of this Commission" (A 117 (emphasis added)).

Aside from "political balance of power" concerns, Chairman Cindrich also admitted that party strength, as indicated by percentage of party registration, played a major part in the "squeeze out" of Senator Pecora's district:

> Now, as to a couple of other points about demographics. When you look at the shift in the loss in population in the Allegheny County area, *what we find is that it had little or no effect on the registration of people there, the party registration*. So that while the Republican argument was that Democrats should lose two seats, in fact 10 years ago the registration was roughly 70 percent Democrat, 30 percent Republican. Ten years later, same area looking at it from a jet up high, still 70 percent Democrat, 30 percent Republican. *I was hard-pressed to determine why that should mean the loss of an incumbent seat for the Democrats*.

* * *

> So that on balance with the population going east and that seat being clearly a seat that will favor a Republican candidate by very strong voter trends and by very strong registrations, then in the west both parties lost a side. *If we had gone the other way we would have the rather anomalous situation of the Allegheny County region having a 70-30 voter registration edge and having a 50-50 party split in terms of the representation in the Senate of Pennsylvania. It didn't seem to the Chairman to be an appropriate thing to do.*

(A 118, 120 (emphasis added).)

Following its review and discussion of the 1991 Preliminary Reapportionment Plan on September 25, 1991, the Commission voted four to one to adopt the Plan (A 5-6, 122-123). Pursuant to the requirements of *Pa. Const.* Art. II, § 17(c), the Commission held a public meeting on October 9, 1991, at which any person aggrieved by the Preliminary Plan could file exceptions thereto with the Commission (A 6, 125-130). On October 9, 1991, Senator Pecora filed his written Exceptions, with a Memorandum in Support thereof, with the Commission (A 6, 127). As part of his written Exceptions, Senator Pecora submitted an alternative reapportionment plan, limiting the elimination of a Senatorial district to the odd-numbered districts in Allegheny County. This alternative plan proposed districts with population deviations that were comparable to and not significantly, if at all, greater than those contained in the Commission's 1991 Final Plan of Reapportionment (A 9-10, 26-29).

At its meeting held on November 15, 1991, the Commission rejected the Petitioner's Exceptions and adopted the 1991 Final Plan of Reapportionment by a three to two vote, State Senators Loeper and Mellow voting against adoption of the Final Plan (A 6-7, 132-133). Thus, Chairman Cindrich provided the key "swing" vote in favor of the Final Plan.

On or about December 9, 1991, Senator Pecora filed a timely Petition for Review (A 4), together with a supporting Brief of Petitioner (A 17), with the Pennsylvania Supreme Court, seeking to set aside that portion of the Final Plan of Reapportionment eliminating the 44th Senatorial District (A 13). In his Petition for Review, Senator Pecora specifically alleged that by eliminating Petitioner's 44th Senatorial District in mid-term, the Commission "has violated various provisions of the Constitution of Pennsylvania, *the right to petition as guaranteed by the First and Fourteenth Amendments of the Constitution of the United States, the Equal Protection Clause of the Constitution of the United States*, controlling decisional law of the Federal Courts and of the Courts of the Commonwealth of Pennsylvania" (A 7 (emphasis added)). Both the "right to petition" question (A 18-23) and the "equal protection" questions (A 29-40) were argued at length in Senator Pecora's Brief of Petitioner.

On February 14, 1992, the Pennsylvania Supreme Court entered an Order and Per Curiam Opinion (A 1-3), wherein it stated that "this Court, after consideration of the objections raised in the above-captioned petitions [including Senator Pecora's Petition for Review], finds that the Final Plan of the 1991 Pennsylvania Legislative Reapportionment Commission is not contrary to law, and the Petitions for Review are denied" (A 2). Senator Pecora now seeks to have this Order reviewed in this Court by way

of the issuance of a Writ of Certiorari to the Pennsylvania Supreme Court.

REASONS WHY THE PETITION SHOULD BE GRANTED

The Petition presents a novel and important question of federal constitutional law as to whether, in reapportioning the voting districts for a state legislature, a state reapportionment commission may single out one incumbent Senator for unfavorable treatment by eliminating his voting district and truncating his term of office in mid-term for solely partisan political reasons, without violating the Equal Protection Clause of the Fourteenth Amendment.

In announcing the principle of "one person, one vote" to compel states to eliminate gross disparities among voting district populations, this Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), "plainly recognized that redistricting should be based on a number of neutral criteria, of which districts of equal population was only one." *Davis v. Bandemer*, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part). These neutral criteria include assuring that districts are compact and cover contiguous territory, *Reynolds v. Sims*, *supra*, 377 U.S. at 578-79, as well as adherence to the boundaries of established political subdivisions. *Id.* at 580-81. Thus, as the Court recognized in *Gaffney v. Cummings*, 412 U.S. 735 (1973):

> Fair and effective representation may be destroyed by gross population variations among districts, but it is apparent that such representation does not depend solely on mathematical equality among district populations. There are other relevant factors to be taken into account and other important interests that States may legitimately be mindful of.

Id. at 748-49.

On the other hand, certain criteria or interests are clearly not among "the important interests that States may legitimately be mindful of" when redistricting. Thus, the factor of incumbency "has no place in any reapportionment or redistricting." *Klahr v. Williams*, 313 F. Supp. 148, 152 (D. Ariz. 1970), *aff'd sub nom. Ely v. Klahr*, 403 U.S. 108 (1971). Likewise, the consideration of party strength is "inapposite" as a factor in reapportionment or redistricting. 313 F. Supp. at 152. These and other purely partisan political considerations are not legitimate goals of redistricting.

It is well established that to survive an equal protection attack under the rational basis test, a classification must be rationally related to the promotion of a legitimate state goal or interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985). This standard recognizes that some objectives, such as a bare desire to harm a politically unpopular group, *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), or deferring to the irrational negative attitudes or fears of certain citizens toward others, *City of Cleburne v. Cleburne Living Center*, *supra*, 473 U.S. at 448, "are not legitimate state interests." *Id.* at 446-47.

In the case at bar, the 1991 Final Plan of Reapportionment created two classifications of State Senators, namely those State Senators allowed to complete their full four-year terms of office, and a single Senator, the Petitioner, whose term was cut off in mid-term by the Plan. No previous legislative reapportionment plan adopted by the Commission had ever resulted in the premature truncation of a State Senator's term of office. In adopting the 1991 Plan, the Commission nevertheless intentionally chose to single out Senator Pecora's former 44th Senatorial District for elimination and thereby to deprive Senator Pecora of the

ability to serve out his full four-year term in the General Assembly.

The Commission "squeezed out" Senator Pecora not in order to serve some legitimate goal of redistricting such as satisfying the constitutional mandate of "one person, one vote" or creating districts that were somehow more compact or more closely contiguous with political subdivision lines. Rather, the Commission chose to eliminate Senator Pecora's former 44th Senatorial District solely to maintain the political status quo or "political balance of power" in both the Pennsylvania Senate and the State Legislature taken as a whole. Senator Pecora was deliberately sacrificed in order to create a district with a strong one-party (i.e., Republican) registration in southeastern Pennsylvania, while merging Senator Pecora's former district, having a large majority of registered Democrats, with a former Democratic district so as to increase the likelihood of a Democrat being elected from the new district in Allegheny County created by this merger.

Certainly, the partisan political purpose for eliminating Senator Pecora's district and truncating his term, namely to maintain the political status quo or balance of power in the State Legislature, was not a legitimate governmental purpose of redistricting. Consequently, the disadvantageous treatment of Senator Pecora for purely partisan political reasons did not rationally promote any legitimate State goal, thereby violating the Senator's right to equal protection. The Petition should therefore be granted in order to remedy the Commission's violation of Senator Pecora's Fourteenth Amendment right to the equal protection of the laws and to deter similar violations in future legislative reapportionments.

Senator Pecora's Petition also raises an important question as to whether the Commission's action in singling out

the Petitioner's 44th Senatorial District for elimination amounted to an unconstitutional political gerrymander[5] in violation of the Equal Protection Clause of the Fourteenth Amendment. As a majority of the Court has yet to adopt a uniform test or standard for evaluating claims of political gerrymandering under the Equal Protection Clause, this Petition presents an opportunity for the Court to clarify the law in this area.[6]

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5 Gerrymandering has been defined as "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes." *Davis v. Bandemer, supra*, 478 U.S. at 164 (Powell, J., concurring in part and dissenting in part) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring)). This definition properly focuses on "whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends." 478 U.S. at 165.

6 As Justice Powell noted in his separate opinion in *Davis v. Bandemer, supra*, the Court's decision in *Davis* failed to enunciate any standard that affords guidance to legislatures and courts: "Legislators and judges are left to wonder whether compliance with 'one person, one vote' completely insulates a partisan gerrymander from constitutional scrutiny, or whether a fairer, but as yet undefined standard applies. The failure to articulate clear doctrine in this area . . . appears to signal the 'constitutional green light' to would-be gerrymanders." 478 U.S. at 171-73 (Powell, J. concurring in part and dissenting in part) (footnotes omitted).

The Court first addressed the issue of political gerrymandering in *Davis v. Bandemer*, *supra*. In that case, the Indiana State Legislature, both houses of which had Republican majorities, and Indiana's Republican Governor approved a legislative district reapportionment plan which was allegedly designed to maintain Republican control of the legislature. The plan was recommended by a conference committee consisting entirely of Republicans. A number of Indiana Democrats filed suit against various state officials in Indiana federal district court, alleging that the reapportionment plan was intended to and did violate their rights, as Democrats, to equal protection under the Fourteenth Amendment.

In reversing the decision of a three-judge district court declaring the reapportionment plan unconstitutional, the Court, by a vote of six to three, held that a political gerrymandering claim, i.e., a claim alleging that a reapportionment plan for state legislative districts violates the rights of members of a political party to the equal protection of the laws under the Fourteenth Amendment because the district lines were drawn with the intention and effect of disadvantaging members of that party, is not a nonjusticiable political question but presents a justiciable controversy. 478 U.S. at 124-25. These six members of the Court, however, split over the question of whether the plaintiffs had in fact presented a viable political gerrymandering claim.

A plurality of four Justices concluded that the plaintiffs in a political gerrymandering case are "required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect." *Id.* at 127. Moreover, according to the plurality, "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132. In other words, "a finding of unconstitu-

tionality must be supported by evidence of continued frustration of the will of a majority of voters or effective denial to a minority of voters of a fair chance to influence the political process." *Id.* at 133. As the proof before the district court did not meet this highly restrictive test, the plurality joined with the three dissenters on the justiciability issue in reversing the district court's judgment.

Justice Powell, joined by Justice Stevens, filed a dissenting opinion, concluding that the merits of a political gerrymandering claim turn on whether the boundaries of voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends, which must be determined by reference to a number of factors, including the configuration of the districts, the observance of political subdivision lines, the nature of the procedures by which the apportionment law was adopted, and legislative history reflecting contemporaneous legislative goals, including any evidence of solely partisan motivation. *Id.* at 173, 177-78.[7] Justice Powell further stated that "[t]he District Court found, and I agree, that appellants failed to justify the discriminatory impact of the plan by showing that the plan had a rational basis in permissible neutral criteria." *Id.* at 184.

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7 Thus, Justice Powell found that "the record unequivocally demonstrates that in 1981 the Republican-dominated General Assembly deliberately sought to design a redistricting plan under which members of the Democratic party would be deprived of a fair opportunity to win control of the General Assembly at least until 1991, the date of the next redistricting." *Id.* at 178.

Of course, a fundamental difference exists between *Davis* and the case at bar. In *Davis*, voters from one party challenged an entire legislative reapportionment plan that allegedly disadvantaged that party's voters. In the case at bar, Senator Pecora, an incumbent State legislator, is challenging only one particular aspect of a legislative reapportionment plan as deliberately and arbitrarily singling him out for unfavorable treatment. In accordance with this key difference, the test that should be applied to Senator Pecora's equal protection claim should not be as stringent as that applied by the plurality opinion in *Davis*.

Petitioner respectfully submits that the correct test to be applied to the type of case presented here is that formulated by Justice Powell in his dissenting opinion in *Davis*. In view of the record evidence, it can readily be seen that the Commission deliberately and arbitrarily distorted the boundaries of voting districts by eliminating Senator Pecora's former 44th Senatorial District located in western Pennsylvania and creating a new 44th District in southeastern Pennsylvania on the opposite side of the State. Moreover, the Commission carried out this distortion of voting district boundaries in order to achieve illegitimate, partisan ends, i.e., to preserve or maintain the status quo or political balance of power within the State Senate.

Evidence of this political gerrymandering can be found not only in the record of the Commission's proceedings, but also by reference to the configuration of the districts created by the Final Plan and the fact that the Commission departed from its consistent prior practice, in formulating and adopting legislative redistricting plans, of avoiding the truncation of the terms of Senators in mid-term. Nor has the Commission advanced any justification for the discriminatory impact of the 1991 Plan in achieving the "squeeze out" of Senator Pecora's district that has a rational basis in neutral criteria. The Petition should therefore be granted

to invalidate the Commission's unconstitutional political gerrymander and to restore the former 44th District, thereby enabling Senator Pecora to serve out his full four-year term of office. The Court would thereby signal a "constitutional red light" to all would-be gerrymanders in future redistricting in Pennsylvania and other states.

The Petition also raises a novel and important question of federal constitutional law as to whether the Commission's action, by leaving the residents of the new 44th Senatorial District without a representative in the Senate of the Pennsylvania General Assembly, unconstitutionally abridges the rights of these residents to exercise their First Amendment right to petition the Pennsylvania Legislature for redress of grievances.[8]

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8 Petitioner may assert the First Amendment rights of the inhabitants of the new 44th Senatorial District under the doctrine of *jus tertii*. While ordinarily "one may not claim standing . . . to vindicate the constitutional rights of some third party," *Barrows v. Jackson*, 346 U.S. 249, 255 (1952), the concern that rights are most effectively asserted by those owning them is sufficiently eased to allow surrogate standing where there are circumstantial assurances of a litigant's effective advocacy of third-party rights. *Id.* at 258. Such assurances are provided where the relationship between the state-enforced measure, the injury to the litigant, and the purpose or effect of the measure naturally compels the litigant to fully and aggressively assert the constitutional claims of the third persons. *Id.* Where such assurances exist, the litigant may assert the rights of third parties that would be diluted or adversely affected should his constitutional challenge fail. *Carey v. Population*

The right to petition for a redress of grievances is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). It is cut from the same cloth as the other guarantees of the First Amendment, and "is an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). In *United States v. Cruikshank*, 92 U.S. (2 Otto) 542 (1876), the Court declared that this right is implicit in "[t]he very idea of government, republican in form." *Id.* at 552.

The First Amendment's guarantee of the right to petition, which applies to the states through the Fourteenth Amendment, *see Procunier v. Martinez*, 416 U.S. 396, 406

Services International, 431 U.S. 678, 684 (1977); *Craig v. Boren*, 429 U.S. 190, 195 (1976). In the case at bar, the state-enforced measure in question, namely the 1991 Reapportionment Plan, caused an injury-in-fact to Petitioner by eliminating his 44th Senatorial District in western Pennsylvania and creating a new, unrepresented 44th District in southeastern Pennsylvania, thereby making it impossible for Petitioner to serve out his full four-year term as State Senator. Consequently, Senator Pecora will naturally be compelled to assert fully and aggressively the constitutional claims of the inhabitants of the new 44th Senatorial District in order to have this redistricting overturned. Senator Pecora should therefore be permitted to assert the rights of the inhabitants of the new 44th Senatorial District, whose fundamental First Amendment rights will be diluted or adversely affected should the Petitioner's constitutional challenge fail.

(1974); *Franco v. Kelly*, 854 F.2d 584, 589 (2d Cir. 1988), "extends to all departments of the Government," *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), including the legislative department. *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961); *Novosel v. Nationwide Insurance Co.*, 721 F.2d 894, 899 n.7 (3d Cir. 1983).

This Court has "recurrently treated the right to petition similarly to, and frequently as overlapping with, the First Amendment's other guarantees of free expression." *McDonald v. Smith*, *supra*, 472 U.S. at 490 (Brennan, J., concurring). This similar treatment stems from the fact that "the Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." *Id.* at 485. As these First Amendment rights are "inseparable," *Thomas v. Collins*, 323 U.S. 516, 530 (1945), no sound basis exists for granting any greater or lesser constitutional protection to exercises of the right to petition than other First Amendment expressions. *McDonald v. Smith*, *supra*, 472 U.S. at 485, 490 (Brennan, J., concurring).

It is a well-established principle of First Amendment jurisprudence that where a statute or other enactment does not directly abridge free speech, but tends to have the incidental effect of inhibiting First Amendment rights, it can only be upheld if the effect on the exercise of the First Amendment right in question is minor in relation to the need for control of the conduct and the lack of alternative means for doing so. *Younger v. Harris*, 401 U.S. 37, 51 (1971); *United Mine Workers of America, District 12 v. Illinois State Bar Association*, *supra*, 389 U.S. at 225. In the case at bar, the effect of the adoption of the 1991 Final Plan of Reapportionment by the Commission substantially impairs the ability of the inhabitants of the newly created 44th Senatorial District to exercise their First Amendment

right to petition the Pennsylvania Legislature, as these residents of Pennsylvania will be left without any representative in the State Senate until after the general election to be held in November 1994.[9] While the First Amendment's

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9 The Pennsylvania Constitution does provide that "[w]henever a *vacancy* shall occur in either House, the presiding officer thereof shall issue a writ of election to fill such vacancy for the remainder of the term." *Pa. Const.* Art. II, § 2 (emphasis added). The term "vacancy," however, has been narrowly construed by the Pennsylvania courts, in the context of appointments to fill "vacancies" in judicial offices, as meaning when the occupant of the office actually dies, resigns, retires, is removed or disqualified, or his term of office ends. *Creamer v. Twelve Common Pleas Judges*, 443 Pa. 484, 281 A.2d 57, 68 (1971); *Barbieri v. Shapp*, 29 Pa. Commw. 594, 372 A.2d 939, 943 (1977), *rev'd on other grounds*, 476 Pa. 513, 383 A.2d 218 (1978); *Staisey v. Tucker*, 7 Pa. Commw. 649, 300 A.2d 518, 520 (1973); *see Pa. Const.* Art. V, § 13 (b). Moreover, the term "vacancy" does not generally refer to the condition of an office when it has been first created and has been filled by no incumbent. *Commonwealth v. Dickert*, 195 Pa. 234, 241, 45 A. 1058, 1061 (1900); *Staisey v. Tucker*, *supra*, 300 A.2d at 520. In the case at bar, Senator Pecora has not resigned or retired, nor has he been removed or disqualified under *Pa. Const.* Art. II, §§ 6 or 7. Nor has his four-year term of office ended. Rather, the Petitioner's term of office was truncated or cut off prematurely by the elimination of the 44th Senatorial District in Allegheny County. Consequently, no "vacancy" has been created within the meaning attributed to that term by the Pennsylvania courts. In

right to petition does not limit citizens to petitioning only those representatives for whom they have voted, "it is clear that legislators will be most responsive to citizens who place them in office and who, more importantly, reserve the power to . . . return him to office by reelection." *In re Reapportionment of the Colorado General Assembly*, 647 P.2d 191, 199 (Colo. 1982). Thus, "full protection of this constitutional right requires that each district have an identifiable representative at all times." *Id.* at 199.[10]

Nor does the need to achieve compliance with the "one-person, one-vote" mandates of the United States and Pennsylvania Constitutions justify this major, albeit indirect, abridgement of the right to petition belonging to the residents of the new 44th Senatorial District. The record demonstrates that an alternative means existed for the accomplishment of the goal of achieving compliance with the "one-man, one-vote" principle that would have left the fundamental right of all of the residents of Pennsylvania to petition the State Legislature fully intact. The Commission

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addition, since the new 44th Senatorial District created in southeastern Pennsylvania has never had an incumbent, the *Dickert* decision indicates that there is no "vacancy" in that district within the meaning of *Pa. Const.* Art. II, § 2 so as to trigger the duty to hold a special election to fill this seat.

10 The comments of the Colorado Supreme Court in *In re Reapportionment of the Colorado General Assembly*, *supra*, were made with respect to that court's interpretation of *Colo. Const.* Art. II, § 24, which guarantees the right of the people to petition "those invested with the powers of government for the redress of grievances."

could have, as it had done in the wake of the 1970 and 1980 censuses, altered the boundaries of only those districts up for reelection in 1992, in this case the odd-numbered districts.

For political partisan reasons, however, the Commission refused to adopt this ready alternative. Instead, the Commission decided to sacrifice the First Amendment rights of the inhabitants of the newly created 44th Senatorial District in order to maintain the political status quo, or balance of partisan representation, in the State Legislature. First Amendment rights, however, cannot be suppressed, even indirectly, merely on the basis of political expediency. As the Final Plan's abridgement of the right to petition was totally unnecessary in order to achieve the State's legitimate goal of redistricting the State Legislature to meet State and federal guarantees of equal representation, this Court should grant the Petition to remedy this substantial infringement of First Amendment rights.[11]

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11 While neither this Court nor any other federal court has addressed the question presented here, at least one state supreme court has struck down a reapportionment plan requiring a district to go unrepresented for two years as violative, inter alia, of that state's equivalent of the right to petition. *McCall v. Legislative Assembly*, 291 Or. 663, 634 P.2d 223, 235 (1981); *see Or. Const.* Art. I, § 26, which guarantees to the citizens of Oregon the freedom of "instructing their Representatives."

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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